Supreme Court, U.S.
FILED
AUG 19 1994
OFFICE OF THE CLERK

(2)

No. 94-123

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ADVANCE SECURITY, INC. and
FIGGIE INTERNATIONAL, INC.,

Petitioners,

v.

MARILYN M. MULHALL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JAMES R. HARPER
(Counsel of Record)
RICHARD N. HUBERT
DAVID P. THATCHER
CHAMBERLAIN, HRDLICKA,
WHITE, WILLIAMS & MARTIN
233 Peachtree Street, N.E.
Suite 1400
Atlanta, Georgia 30303
(404) 659-1410
Attorneys for Respondent.

Washington, D.C. • THIEL PRESS • (202) 328-3286

BEST AVAILABLE COPY

18 pp

QUESTION PRESENTED

1. Whether, in the context of an appellate court's *de novo* review of a district court's granting a defense summary judgment, the Eleventh Circuit Court of Appeals was correct in finding that material questions of fact exist with regard to Respondent's claims under the Equal Pay Act, 29 U.S.C. §206(d), and under Title VII, 42 U.S.C. §2000e, *et seq.*?

TABLE OF CONTENTS

Page

QUESTION PRESENTED. i

TABLE OF AUTHORITIES ii

I. Statement Of The Case. 2

II. Reasons To Deny The Writ 6

A. The Decision of the Eleventh Circuit Court of Appeals Expressly Disavowed Utilizing Comparable Worth in its EPA and Title VII Analysis and Represents Merely a *De Novo* Review in the Context of Summary Judgment. 6

1. The Eleventh Circuit reviewed Petitioner's contentions in the context of their admission that recent job performance, profitability of the company, and contribution of each individual employee were the criteria on which salary increases were based. 6

2. Petitioners have presented their challenge to the Eleventh Circuit's *de novo* review of their motion for summary judgment under the label of comparable worth 8

B. EPA's Factor Other Than Sex Affirmative Defense is Alive and Well in the Eleventh Circuit, But Not Proved By Petitioners in the Context of Summary Judgment 11

III. CONCLUSION 14

TABLE OF AUTHORITIES

Cases:

Brennan v. Goose Creek Consol. Indep. Sch. Dist., 519 F.2d 53 (5th Cir. 1975) 11

Brock v. Georgia Southwestern College, 765 F.2d 1026 (11th Cir. 1985). 11

Christensen v. State of Iowa, 563 F.2d 353 (8th Cir. 1977) 7

Cases, continued: **Page**

Corning Glass Works v. Brennan, 417 U.S. 188 (1974) 11

County of Washington v. Gunther, 452 U.S. 166 (1981) 7

EEOC v. White & Sons Enters., 881 F.2d 1006 (11th Cir. 1989) 8, 11

Gosa v. Bryce Hosp., 780 F.2d 917 (11th Cir. 1986) 11

Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913 (11th Cir. 1993) 8

McDonnell Douglas v. Green, 411 U.S. 792 (1973) 8

Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518 (11th Cir. 1992) 8

Mitchell v. Jefferson County Bd. of Educ., 936 F.2d 539 (11th Cir. 1991) 11

Schwartz v. Florida Bd. of Regents, 807 F.2d 901 (11th Cir. 1987) 11

Texas Dep't of Community Affairs v. Burdine, 45 U.S. 248 (1981) 8, 9

United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983) 9

Waters v. Turner, Wood & Smith Ins. Agency, Inc., 874 F.2d 797 (11th Cir. 1989) 12

Other:

Rule 56 of the Federal Rules of Civil Procedure 6

No. 94-123

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ADVANCE SECURITY, INC. and
FIGGIE INTERNATIONAL, INC.,

Petitioners,

v.

MARILYN M. MULHALL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Marilyn M. Mulhall ("Respondent") respectfully requests that this Court deny the Petition for a Writ of Certiorari pending in this matter filed by Advance Security, Inc. and Figgie International, Inc. (collectively "Petitioners").

I.
STATEMENT OF THE CASE

In November 1978, petitioner Advance Security, Inc. ("petitioner Advance") hired Respondent as Manager of Services. Respondent was promoted to Manager of Administration in October 1979 and given responsibility for petitioner Advance's important and lucrative contract with Sandia National Laboratories at Tonapah, Nevada. Petitioner Advance promoted Respondent to Vice-President, Administration in January 1981, at which time the position of Manager, Industrial Relations was eliminated, and the majority of its duties consolidated into the Vice-President, Administration position. During 1982, petitioner Advance shifted responsibility for the management of the hourly employee group medical program from Vice-President, Controller to Vice-President, Administration. T. Michael Roquemore held the position of Vice-President, Controller at the time of the transfer of responsibility.

In August 1984, Respondent became eligible to participate in the Figgie Executive Compensation Bonus Program. At the time of admission, Respondent was the only woman participating in petitioner Figgie's bonus program for executives. Petitioner Advance acquired two companies in the summer and fall of 1985. Petitioner Advance acquired Metro Security of Tampa, Florida, in August 1985, and Gregg Security of Pittsburgh, Pennsylvania, in November 1985. In September 1985, petitioner Advance was awarded the Livermore, California contract by Sandia National Laboratories, another lucrative government security contract. Respondent was responsible for the account and personally directed the transition and startup of the Livermore facility.

In December 1985, T. Michael Roquemore held the position of Vice-President, Controller, one of the positions to which Respondent contends her former position is comparable. At that time, Vice-President, Controller and Vice-President, Administration were classified identically by petitioner Figgie as job class IV. Respondent was evaluated by her supervisor on an executive performance appraisal dated December 9, 1985, with 45.5 points. Her supervisor recommended a merit increase in plaintiff's compensation of 12%. Petitioner Figgie reduced the increase in Respondent's compensation from the recommended amount to 6.7%. Mr. Roquemore also was evaluated by his supervisor on an executive performance appraisal dated December 9, 1985, with 34.2 points. Mr. Roquemore received a merit increase of 5.9% of his compensation.

Representatives of petitioner Advance assured Respondent that the job classification of her former position would be re-evaluated after the various acquisitions by petitioner Advance. In December 1986, the position of Vice-President, Controller was elevated from job class IV to job class V. Respondent's former position of Vice-President, Administration, remained at job class IV. In August 1987, petitioner Advance acquired Titan Security of Mountain View, California. Only one month later, petitioner Advance shifted responsibility for its workers' compensation program and hourly group medical program from Vice-President, Controller to Respondent's former position of Vice-President, Administration. In December 1988, petitioner Advance hired William T. Hill to develop a separate investigations division of petitioner Advance.

In January 1989, petitioner Advance terminated Mr. Roquemore from the position of Vice-President, Con-

troller, which at the time of termination was classified as job class V. In March 1989, Larry V. Nelson transferred from petitioner Figgie to petitioner Advance to fill the position of Vice-President, Controller. At the time of Mr. Nelson's transfer, the position of Vice-President, Controller was reclassified as job class VII. Despite Respondent's exceptional performance and profitability, Respondent's job class was stifled at job class IV, three job classification categories below Mr. Nelson, Vice-President, Controller. It is particularly noteworthy that within petitioner's compensation system, each position is classified at a particular job class, which in turn establishes a range within which a particular employee's salary is set. Based on the range of salary available for each job class, two employees whose positions are classified as identical job classes may receive substantially differing amounts of annual compensation.

Respondent filed suit against petitioners on May 17, 1991, alleging sexual discrimination based on Petitioners' denial to Respondent of equal pay and failure to promote Respondent on two occasions to the position of president of petitioner Advance. For purposes of her claims of denial of equal pay, Respondent compares her compensation as Vice-President, Administration to the positions of Vice-President, Operations, Vice-President, Controller, President of the ICA division of petitioner Advance, Regional Manager, and Project Manager. The district court granted Petitioners' motion for summary judgment. On appeal, the Eleventh Circuit vacated the district court's order on Respondent's Equal Pay Act ("EPA") claims, except with respect to William Hill's job, and on Respondent's Title VII claim, except with respect to Edward Trumbull, and remanded the case for further

consideration. The Eleventh Circuit found that genuine issues of material fact exist with regard to Respondent's EPA claims on the issues of (1) whether Respondent and Group 1 comparators worked in a single establishment; (2) whether Respondent and the Group 3 comparators performed substantially similar work; and (3) Petitioner's failure to establish their affirmative defense as a matter of law as relates to Groups 1, 3 and 4 comparators. The Eleventh Circuit also found that, regarding Respondent's Title VII claims, Respondent established a prima facie case and responded to Petitioners' legitimate non-discriminatory explanations for the pay disparities with evidence of pretext sufficient to raise a genuine factual question appropriate for consideration by a jury with respect to the comparators in Groups 1, 2 and 3, and as to Group 4 comparators Massemei and Gregg. *Mulhall v. Advance Security, Inc.*, 19 F.3d 586 (11th Cir. 1994).

II.

REASONS TO DENY THE WRIT

A. The Decision of the Eleventh Circuit Court of Appeals Expressly Disavowed Utilizing Comparable Worth in its EPA and Title VII Analysis and Represents Merely a *De Novo* Review in the Context of Summary Judgment.

1. The Eleventh Circuit reviewed Petitioner's contentions in the context of their admission that recent job performance, profitability of the company, and contribution of each individual employee were the criteria on which salary increases were based.

The Eleventh Circuit did not rely on the theory of comparable worth in its *de novo* review of the district court's decision. The Eleventh Circuit reviewed Petitioners' contentions on summary judgment in the context of the parameters of Rule 56 of the Federal Rules of Civil Procedure. In the discovery phase of the litigation, Respondent asked Petitioners to state each and every fact with particularity that Petitioners considered in setting the amount of compensation to be paid to Respondent and her comparators at the time of hiring and each time each employee received a salary increase. 19 F.3d at 596-97 n.25. Petitioners responded, in relevant part, that general considerations included recent job performance, *profitability of the company, and the contribution of each individual employee. Id.* Thus, Petitioners made Respondent's and her comparators' monetary contributions to the profitability of Petitioners relevant to the disparity in wages. The Eleventh Circuit's consideration of profits attributable to each comparator thus serves an important purpose in its analysis of

Respondent's EPA and Title VII claims. In the context of EPA claims, the consideration of profits is relevant to determine whether Petitioners satisfied their burden of production and persuasion on their affirmative defense. In addition, they are relevant in the context of Respondent's Title VII claims to the issue of whether Petitioners' legitimate reasons for the pay disparities are merely pretextual. Nonetheless, if Petitioners had not made profits relevant through their discovery response, the Court might be faced with the issue of comparable worth. In this case, it is not.

The record contains no evidence supporting a comparison of jobs based on the value of each job to Petitioners. Under the theory of comparable worth, a plaintiff might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of her job with that of other jobs in the same organization or community. *County of Washington v. Gunther,* 452 U.S. 166 (1981). In such a case, the plaintiff would call upon the court to make its own subjective assessment of the value of the male and female jobs, or to attempt by statistical technique or other method to quantify the effect of sex discrimination on the wage rates. *Id.* at 181. In fact, a plaintiff who seeks a review of her depressed wages on the theory of comparable worth may be forced into that cause of action on the basis that the comparison is between positions with genuinely different work classifications. *Christensen v. State of Iowa,* 563 F.2d 353, 356 (8th Cir. 1977). If the positions that the plaintiff seeks to compare are genuinely different, she would be excluded from the Equal Pay Act and Title VII case. Thus, petitioners essentially argue that the Eleventh Circuit's decision, finding that Respondent's former position of Vice-President, Administration

may be properly compared to those of her comparators, based on the record before it and in the context of summary judgment, was incorrect. Petitioners craftily disguise their dissatisfaction with the Eleventh Circuit's review of the evidence on summary judgment under the veil of comparable worth.

2. Petitioners have presented their challenge to the Eleventh Circuit's *de novo* review of their motion for summary judgment under the label of comparable worth.

The Eleventh Circuit reviewed Petitioners' motion for summary judgment on plaintiff's Title VII claims in the *McDonnell Douglas Burdine* framework. 19 F.3d at 597 (quoting *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1528 (11th Cir. 1992) (citing *McDonnell Douglas v. Green*, 411 U.S. 792 (1973))). If a plaintiff makes a prima facie case under the EPA, she simultaneously establishes facts necessary to go forward with her Title VII claim. *EEOC v. White & Sons Enters.*, 881 F.2d 1006 (11th Cir. 1989). If the petitioner meets its burden of production associated with articulating a legitimate, non-discriminatory reason for the pay disparity, the prima facie case is rebutted and drops from the case. *Texas Dep't of Community Affairs v. Burdine*, 45 U.S. 248 (1981).

The plaintiff must then demonstrate that the employer's legitimate reason was in fact pretextual. The Eleventh Circuit noted that courts have recognized that an employer's true motivations are especially difficult to establish, making such factual determinations "generally unsuitable for disposition at the summary judgment stage." 19 F.3d at 598; *Hairston v. Gainesville Sun Pub.*

Co., 9 F.3d 913, 919 (11th Cir. 1993); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983). "In order to establish pretext, the plaintiff is not required to introduce evidence beyond that already offered to establish the prima facie case." 9 F.3d at 921. "Evidence already introduced to establish the prima facie case may be considered, and 'indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross examination of the defendant, will suffice to discredit the defendant's explanation' and establish pretext." *Id.* (quoting *Burdine*, 450 U.S. at 256 n.10). Accordingly, the grant of summary judgment, though appropriate when evidence of discriminatory intent is totally lacking, is generally unsuitable in Title VII cases in which the plaintiff has established a prima facie case because of the "illusive factual question" of intentional discrimination. *Burdine*, 45 U.S. at 256.

Within this framework, the Eleventh Circuit found that Respondent presented evidence of pretext sufficient to overcome Petitioners' motion for summary judgment. Rather than relying on the theory of comparable worth, the Eleventh Circuit found that the disparity of pay, when considered in light of a comparison of Respondent's contributions to Petitioners' profitability with her comparators' contributions to Petitioners' profitability, which comparison was based on Petitioners' admission that they considered such criteria in determining increases in compensation, resulted in the Eleventh Circuit's concluding that a material question of fact exists as to whether Petitioners' articulated reasons are pretextual.

The Eleventh Circuit affirmed the district court's granting summary judgment to Petitioners with regard

to comparator Trumbull on plaintiff's Title VII claim.[1] The Eleventh Circuit vacated and remanded the district court's decision with regard to comparators Massemei and Gregg. Petitioners articulated a legitimate, nondiscriminatory reason for the disparity in wages by contending that the Group 4 comparators were paid more because their salaries were negotiated as a part of the sale of their businesses to Petitioners. The Eleventh Circuit found that, when Trumbull's contract terminated in 1992, his salary dropped dramatically to an amount below Respondent's 1991 salary. The Eleventh Circuit held that the adjustment of Trumbull's salary negated Respondent's claim of pretext as to this comparator. The Eleventh Circuit's affirming the district court's decision on Respondent's Title VII claims with regard to Trumbull belies Petitioners' assertion in this Court that the Eleventh Circuit relied upon comparable worth. The Eleventh Circuit said that Petitioners' legitimate reason was not a pretext, since Trumbull's salary was adjusted downward after the term of the contract. Yet, Petitioners failed to explain their reasons for not adjusting Massemei and Gregg's pay once their contracts terminated. The adjustment of Trumbull's salary actually begs the question of why there was a prolonged and pervasive disparity in pay between Respondent and Massemei and Gregg years after the contracts for the purchase of their businesses terminated. The Eleventh Circuit thus found that Respondent satisfied her burden of showing evidence of pretext sufficient to overcome Petitioners' motion for summary judgment with respect to Massemei and Gregg, but not with respect to Trumbull. The Eleventh Circuit simply did not rely on the theory of comparable worth.

---

[1] Comparators Massemei, Gregg and Trumbull are referred to herein as "Group 4" comparators consistent with the terminology of the Eleventh Circuit's opinion. 19 F.3d at 588.

B. EPA's Factor Other Than Sex Affirmative Defense is Alive and Well in the Eleventh Circuit, But Not Proved by Petitioners in the Context of Summary Judgment.

The Eleventh Circuit found that Petitioners failed to satisfy their burdens of production and persuasion on their affirmative defenses to Respondent's EPA claims. In a case brought under the EPA, the initial burden rests with the plaintiff to show "that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility.' " *Schwartz v. Florida Bd. of Regents,* 807 F.2d 901, 907 (11th Cir. 1987) (quoting *Corning Glass Works v. Brennan,* 417 U.S. 188 (1974)). In addition, the comparators must work in the same "establishment" as the plaintiff. *Brennan v. Goose Creek Consol. Indep. Sch. Dist.,* 519 F.2d 53, 57 (5th Cir. 1975). The plaintiff establishes a prima facie case when she satisfies both components as applied to merely one comparator. *Mitchell v. Jefferson County Bd. of Educ.,* 936 F.2d 539 (11th Cir. 1991); *EEOC v. White & Son Enters.,* 881 F.2d 1006 (11th Cir. 1989).

Once the plaintiff establishes her prima facie EPA case, the burden then shifts to the defendant to prove by a preponderance of the evidence that the disparity in pay is justified by one of the EPA's affirmative defenses. *Brock v. Georgia Southwestern College,* 765 F.2d 1026 (11th Cir. 1985). In order to satisfy its burden, the defendant must show that the factor of sex provided *no basis* for the wage differential. *Gosa v. Bryce Hosp.,* 780 F.2d 917 (11th Cir. 1986) (the requirements for proving an exception are not met unless the factor of sex provides no part of the basis for the wage differential).

The Eleventh Circuit relied on the foregoing, well-established principles of EPA law, in the context of summary judgment, which requires the court to view the evidence in the light most favorable to the non-movant, and found merely that, based on the record, plaintiff should not be foreclosed from her day in court. *Waters v. Turner, Wood & Smith Ins. Agency, Inc.*, 874 F.2d 797 (11th Cir. 1989). The Eleventh Circuit set forth the standard it applied as follows: "If plaintiff's evidence, with all inferences drawn in her favor, establishes an EPA violation and there is sufficient evidence such that a jury could find in her favor, then summary judgment for defendants is improper." 19 F.3d at 592. By way of example, the Eleventh Circuit stated that it was "*not convinced* that skills needed in the controller position, even as it is currently structured, are not substantially similar to those of the Vice-President for Administration." 19 F.3d at 594 (emphasis supplied). Thus, Petitioners' dissatisfaction is with the Eleventh Circuit's *de novo* review of the evidence in the record. The Eleventh Circuit reviewed the evidence based on Petitioners' admitted criteria in determining increases in compensation. As Petitioners' dissatisfaction is actually with a review of the evidence, this Court should deny their Petition for Writ of Certiorari.

Furthermore, the Eleventh Circuit found that, with regard to Respondent's EPA claim concerning Massemei, Gregg and Trumbull, Petitioners failed to establish that there is no genuine issue of material fact as to its affirmative defense that the disparity in wages were simply part of a larger negotiation picture surrounding the purchase of the comparators' businesses. 19 F.3d at 596-97. The rule of law Petitioners contend the Eleventh Circuit created in its opinion is inventive and not

supported by the decision. Although the Eleventh Circuit stated that Petitioners "seemingly suggest that market forces demanded paying higher salaries to [Massemei, Gregg and Trumbull] in order to sweeten the purchase deals", 19 F.3d at 596, the Eleventh Circuit did not rest its decision on the market forces.

> We do not hold that an employer may never pay higher wages to a new employee whose position results from the purchase of his business. We simply hold that the record before us does not establish as a matter of law that comparators' superior experience, training or ability, or exigent business circumstances justified greater compensation than received by plaintiff who occupied a similar position for five years before the comparators' arrival and who consistently out performed two of the three comparators on the very measures defendants admit constitute a basis for setting salaries. Nothing in the record establishes that the disparity in plaintiff's and the comparators' wages was attributable solely to any recognized exception to the EPA.

19 F.3d at 597. Based on the foregoing language limiting the Eleventh Circuit's decision, it is disingenuous for Petitioners to argue in this Court that the Eleventh Circuit's decision stands for the maxim that "the employer has an obligation to *immediately* raise the salaries of other employees doing substantially equal work to the same level, regardless of the reason for the pay differential." Petition for Writ of Certiorari at 19-20 (emphasis supplied). Again, the Eleventh Circuit found that Petitioners failed to prove their affirmative defense in the context of a motion for summary judgment. A genuine issue of material fact exists concerning Petitioners' "failure to at some point raise [Respondent's]

pay to match or exceed that of the comparators when her profit center out performed Massemei's during four out of five years and Trumbull's during all three years of comparison." 19 F.3d at 596.

C. Conclusion.

For all the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

JAMES R. HARPER
(Counsel of Record)
RICHARD N. HUBERT
DAVID P. THATCHER
CHAMBERLAIN, HRDLICKA,
WHITE, WILLIAMS & MARTIN
233 Peachtree Street, N.E.
Suite 1400
Atlanta, Georgia 30303
(404) 659-1410
Attorneys for Respondent.

August 19, 1994